# 22-70

## United States Court of Appeals for the Second Circuit

KEISY GUERRERO MARIANO,

*Petitioner-Appellant*,

v.

THOMAS DECKER, New York Field Office Director for U.S. Immigration and Customs Enforcement, MERRICK B. GARLAND, United States Attorney General, ALEJANDRO MAYORKAS,

*Respondents-Appellees*,

DAVID L. NEAL,

*Defendant-Appellee*.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF FOR STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLANT AND REVERSAL**

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## INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici States of New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Vermont, and Washington, and the District of Columbia, submit this brief in support of petitioner-appellant Keisy G.M., a noncitizen who has been held in immigration detention without a bond hearing for nearly nineteen months. The federal government detained Keisy[1] pursuant to 8 U.S.C. § 1226(c), which governs the immigration detention of noncitizens who have been convicted of a broad range of qualifying offenses, and for whom an order of removal has not been issued. The United States District Court for the Southern District of New York (Cronan, J.) correctly recognized that individuals who are subject to detention under section 1226(c) must be afforded an individualized bond hearing once their detention becomes "unreasonably prolonged." But the court incorrectly held that Keisy's detention of

[1] Because the district court has identified the petitioner by only his first name and last initials "in accordance with the guidance on privacy concerns in immigration cases" (Special Appendix (SPA) 1 n.2), the brief will refer to petitioner as "Keisy" throughout.

fourteen months (and running) did not warrant a bond hearing because Keisy himself had purportedly extended the detention by seeking multiple adjournments to pursue legitimate avenues of immigration relief.

Amici States have a strong interest in ensuring that noncitizens are not subject to prolonged immigration detention pending the completion of removal proceedings absent an individualized finding that they pose a demonstrable danger to society or risk of flight. Amici States are home to more than 25.2 million immigrants,[2] who are valued and active contributors to our communities, work forces, and civic organizations. Many noncitizens who are subject to detention under section 1226(c) pose no present threat to the community or risk of flight, notwithstanding prior criminal offenses. Unnecessary immigration detention inflicts substantial harms on those individuals, their families, and their communities.

The risk that noncitizens will face unreasonably prolonged immigration detention absent the due process protection of an individualized bond hearing is substantial. Removal proceedings—and hence

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[2] Abby Budiman et al., *Facts on U.S. Immigrants, 2018*, Pew Rsch. Ctr. (2020) (internet). (For authorities available on the internet, full URLs appear in the Table of Authorities. All URLs were last visited on May 2, 2022.)

detention pending such proceedings—often take months or even years to resolve. Removal proceedings can especially be lengthy when a noncitizen asserts defenses to removal or seeks other forms of immigration relief. Under the district court's analysis, an immigrant's due process right to avoid unreasonably prolonged detention is contingent on his willingness to forgo avenues of immigration relief and any attendant adjournments. Such a holding unduly penalizes immigrants for pursuing in good faith remedies available under the law.

Amici States are sensitive to the governmental considerations at issue in this case. Indeed, amici have extensive experience with various state-law civil-detention and criminal pretrial detention schemes. Our experience has shown that affording detainees individualized bond hearings properly balances public safety and other state interests against the risk of erroneously depriving individuals of their important liberty interests.

# ARGUMENT

## POINT I

### UNREASONABLY PROLONGED IMMIGRATION DETENTION HARMS IMMIGRANTS, THEIR FAMILIES, AND THE PUBLIC INTEREST

Noncitizens who are detained pursuant to section 1226(c) include both persons with authorization to be in the United States and undocumented immigrants. Many of these individuals are not presently dangerous, pose no risk of flight, and contribute substantially to their families, communities, and to amici States. These individuals are nevertheless often denied the opportunity to secure release, even when their period of detention extends to many months or years, because district courts, such as the court below, have imposed an extraordinarily high bar on section 1226(c) detainees who seek an individualized bond hearing. Amici States write to highlight the substantial harms that prolonged immigration detention imposes on these individuals, their families, and the public interest.

As an initial matter, the current backlog in immigration courts means that, absent a bond hearing, section 1226(c) detainees can expect to be detained, as a matter of course, for many months or even years while they await the conclusion of their removal proceedings. According to

Transactional Records Access Clearinghouse–Immigration's latest estimates, more than 1.75 million immigration cases are currently pending—constituting the largest (and fastest-growing) backlog of cases to date.[3] As a result, individuals with pending removal proceedings are experiencing substantially prolonged processing times. During the 2021 fiscal year, cases resulting in orders of removal took an average of 1,178 days (over three years) to resolve in Immigration Court.[4] And cases resulting in a grant of asylum or another form of relief from removal took on average of 1,972 days (over five years) to conclude.[5] The time periods for resolution can be even longer for parties who choose to appeal any adverse ruling by an Immigration Judge. The backlog of appeals pending before the Board of Immigration Appeals (BIA) has also skyrocketed: over the last five years, the number of pending BIA appeals increased 637

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[3] Transactional Records Access Clearinghouse (TRAC)–Immigration, *Immigration Court Backlog Tool* (through Mar. 2022) (internet); TRAC–Immigration, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases* (Jan. 18, 2022) (internet); *see also* Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, Time, Jan. 20, 2022 (internet).

[4] TRAC–Immigration, *Immigration Court Processing Time by Outcome* (through Mar. 2022) (internet).

[5] *Id.*

percent (from 11,129 pending cases in FY 2016 to 82,041 in FY 2021), while the rate of adjudication has ranged between approximately 19,000 to 33,000 appeals per year.[6]

Detention during these extensive removal proceedings is devastating for millions of noncitizens and their family members. According to recent estimates, the United States is home to approximately 13.6 million lawful permanent residents, 10.3 million undocumented immigrants, and 2.8 million holders of temporary visas.[7] Many of these individuals, like Keisy, reside in a household with United States citizen children, or have citizen spouses and other family members. Indeed, nearly 17 million people live in a home with one or more undocumented immigrant family members and, in ten States—including amici California, Illinois, Nevada, New Jersey, New Mexico, New York, and Washington—at least 5% of the total

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[6] U.S. Dep't of Just., *Executive Office for Immigration Review Adjudication Statistics: Case Appeals Filed, Completed, and Pending* (Jan. 19, 2022) (internet).

[7] Cecilia Esterline & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Pol'y Inst. (Mar. 17, 2022) (internet); Am. Immigr. Council, Fact Sheet: Immigrants in the United States (2021) (internet); Bryan Baker, U.S. Dep't of Homeland Sec., Estimates of the Lawful Permanent Resident Population in the United States and Subpopulation Eligible to Naturalize: 2015-2019 (2019) (internet).

population resides in a home with at least one undocumented family member.[8] The well-established detrimental effects of prolonged detention of close family members include housing insecurity, economic instability, and psychological and emotional trauma.[9] Prolonged immigration detention also poses substantial risks for vulnerable detainees such as women and LGBT individuals, who experience abuse, sexual harassment, and medical neglect at disproportionately high rates while in immigration custody.[10]

Unreasonably prolonged detention of noncitizens during removal proceedings also deprives States and localities of their substantial economic

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[8] Am. Immigr. Council, *supra*; Silva Mathema, Ctr. for Am. Progress, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants* (2017) (internet).

[9] *See* Randy Capps et al., Urban Inst. & Migration Pol'y Inst., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* 1, 9-14 (2015) (internet); Heather Koball et al., Urban Inst. & Migration Pol'y Inst., *Health and Social Service Needs of U.S. Citizen Children with Detained or Deported Immigrant Parents* 5-9 (2015) (internet); *see also* Dorsey & Whitney LLP, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy* 65-71 (2009) (internet).

[10] Nora Ellmann, Ctr. for Am. Progress, *Immigration Detention Is Dangerous for Women's Health and Rights* (2019) (internet); Sharita Gruberg, Ctr. for Am. Progress, *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse* (2018) (internet).

contributions. Approximately 17 percent of the American workforce is foreign born,[11] and, in 2019, immigrant-led households added over $1.3 trillion to the United States economy as consumers.[12] In New York City alone, immigrants contributed $244 billion—or about 23 percent—of the city's gross domestic product.[13] Nationally, immigrants pay over $492 billion in taxes annually, and immigrant-owned businesses generate over $88 billion in income and employ millions of American workers.[14] In addition, immigrants often fill important but unskilled or low-skilled jobs that other workers may decline to take, especially in burgeoning sectors such as home health work.[15] And their contributions have been especially important during the COVID-19 pandemic: as of 2020, there were 19.8

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[11] U.S. Dep't of Labor, Bureau of Lab. Stat., *Labor Force Characteristics of Foreign-Born Workers Summary* (2021) (internet).

[12] Am. Immigr. Council, *supra*.

[13] N.Y.C. Mayor's Off. of Immigrant Affs., *State of Our Immigrant City* 32 (2021) (internet).

[14] New Am. Econ., *Immigrants and the Economy In: United States of America* (Data Year 2019) (internet).

[15] Dan Kosten, Nat'l Immigr. F., *Immigrants as Economic Contributors: They Are the New American Workforce* (2018) (internet).

million foreign-born "essential" workers, and immigrants disproportionately work in "essential" sectors, such as agriculture, manufacturing, and construction.[16]

Undocumented immigrants, in particular, represent a substantial portion of those making important economic contributions to their communities. Undocumented immigrants constitute approximately five percent of the total workforce and a much larger portion of the workforce in essential sectors.[17] In 2019, households headed by undocumented immigrants paid approximately $11.7 billion in combined state and local taxes and over $18.9 billion in federal taxes.[18] And over the last decade, alone, undocumented immigrants have contributed hundreds of billions of dollars to federal programs such as Social Security and Medicare.[19]

Unreasonably prolonged immigration detention likewise undermines amici States' interests in public safety and the effective administration of

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[16] U.S. Congress, Joint Econ. Comm., Immigrants Are Vital to the U.S. Economy 2 (2021) (internet).

[17] Kosten, *supra*; *see also* New Am. Econ., *Undocumented Immigrants* (internet).

[18] Am. Immigr. Council, *supra*.

[19] New Am. Econ., *Undocumented Immigrants*, *supra*.

justice. Among other things, state and local law enforcement rely on immigrant community members—including undocumented immigrants—to report crimes to local authorities, cooperate in law enforcement investigations, and testify in legal proceedings. However, increased immigration enforcement—including the use of prolonged immigration detention—substantially chills immigrants' interactions with law enforcement and therefore makes it much more difficult to investigate and prosecute crimes such as domestic violence, human trafficking, and labor violations.[20]

Finally, the prolonged detention of immigrants who pose no threat to the community and no risk of flight imposes needless costs on taxpayers that can be avoided by alternatives to detention. For example, in fiscal year 2022, the federal government requested $1.8 billion for 32,500

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[20] *See New York v. U.S. Immigr. & Customs Enf't*, 431 F. Supp. 3d 377, 380-82, 391-92 (S.D.N.Y. 2019); Min Xie & Eric P. Baumer, *Neighborhood Immigrant Concentration and Violent Crime Reporting to the Police: A Multilevel Analysis of Data from the National Crime Victimization Survey*, 57 Criminology 237, 249 (2019); Immigrant Def. Project, *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State* (2019) (internet); Make the Road N.J., *ICE in the New Jersey Courts: The Impact of Immigration Enforcement on Access to Justice in the Garden State* (2017) (internet).

detention beds.[21] By contrast, the government requested only $440 million for its Alternatives to Detention Program, which allows for the community monitoring of approximately 140,000 individuals daily.[22] As one study estimated, taxpayers would save more than $1.4 billion per year if low-risk immigrants were released from immigration detention pursuant to alternative community supervision measures.[23]

Community release would likewise help state and local governments avoid costs that are associated with providing additional social services to families that are affected by the prolonged detention of immigrant family members. As explained above (at 6-7), families that lose a wage-earning parent or relative to immigration detention are at substantially greater risk of losing their housing and being unable to pay for basic needs such as groceries, heating, and medical care. These consequences are likely to increase reliance on public resources such as homeless shelters, medical assistance, and other benefit programs. In addition, some

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[21] U.S. Dep't of Homeland Sec., *FY 2022 Budget in Brief* 3 (2021) (internet).

[22] *Id.*

[23] *See* Ctr. for Am. Progress, *The Facts on Immigration Today* (2017) (internet).

children whose parents are detained may be forced into foster care, which would impose additional burdens on already strained foster care systems.[24] Amici States thus have a substantial interest in preventing the unreasonably prolonged detention of individuals under section 1226(c), which imposes burdens on important state resources and social safety nets.

## POINT II

### THE DISTRICT COURT ERRED IN CONCLUDING THAT KEISY'S CONTINUED DETENTION WITHOUT AN INDIVIDUALIZED BOND HEARING COMPORTS WITH DUE PROCESS

Individuals in removal proceedings are entitled to due process of law, including with respect to any associated detention. *E.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003). Indeed, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). These protections apply to "all 'persons' within the United States, including aliens, whether

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[24] Mark Greenberg et al., Migration Pol'y Inst., *Immigrant Families and Child Welfare Systems: Emerging Needs and Promising Policies* 17-19 (2019) (internet); Char Adams, *Foster Care Crisis: More Kids Are Entering, But Fewer Families Are Willing to Take Them In*, NBC News (Dec. 30, 2020) (internet).

their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693.

The district court in this case correctly recognized that the constitutionality of Keisy's continued detention without a bond hearing requires, at a minimum, "an individualized inquiry into . . . the specific circumstances of the detention." (Special Appendix (SPA) 2.) And the court further correctly identified various factors the district courts in this circuit have considered in assessing the reasonableness of a noncitizen's continued detention under the individualized inquiry.[25] (*See* SPA 13-26.) But the court fundamentally erred in its application of the "reasonableness test" to Keisy's circumstances and in its ultimate conclusion that Keisy's prolonged detention without an individualized bond hearing comports with due process. Amici States write to highlight three particular errors in the district court's analysis that set a harmful precedent for

[25] As the district court noted in its decision, these considerations include, but are not limited to: "(1) the length of detention; (2) the party responsible for the delay; (3) whether the noncitizen has asserted defenses to removal; (4) the nature of the noncitizen's crimes; (5) whether the detention facility is meaningfully different from a penal institution for criminal detention; and (6) whether the noncitizen's detention is near conclusion." (SPA 14.)

impermissibly curtailing the due process rights of individuals detained pursuant to section 1226(c), including valued residents of amici States.

*First*, although the district court acknowledged that the length of Keisy's detention—nearly fourteen months at the time of its decision—"exceeds the 'brief period' that the Supreme Court deemed reasonable in *Demore*, 538 U.S. at 530" (SPA 15), the court incorrectly faulted Keisy for the delay. Indeed, the court's analysis focused primarily on the fact that Keisy—and not the federal government or the Immigration Judge (IJ)—had requested multiple adjournments in order to pursue various avenues of immigration relief. (SPA 15-23.) For example, the district court emphasized that the length of Keisy's detention was purportedly attributable, in part, to the six adjournments he requested during his immigration court proceedings to "prepare adequately for each conference before the [IJ], to prepare his case in opposition to removal, and to seek relief from the removal order." (SPA 21; *see also* SPA 16-17.) And the court further concluded that Keisy's "ongoing detention at this point is the result of his decision to appeal the IJ's decision." (SPA 22; *see also* SPA 16-17.)

The district court's reasoning is wrong in several respects. As an initial matter, penalizing Keisy for seeking available immigration relief

in good faith contravenes established precedent.[26] As the Supreme Court emphasized in *Zadvydas*, the reasonableness of immigration detention must be assessed in light of its purpose: ensuring that the government is able to complete the removal process for noncitizens *ineligible* to remain in the country. *See* 533 U.S. at 699-700. Courts have thus predominantly held that, unlike bad-faith delay, adjournments to pursue immigration relief in good faith should not be held against the detainee, even if they ultimately prolong removal proceedings.[27]

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[26] As explained in Keisy's opening brief (Br. for Appellant at 17-21, 50, ECF No. 40), none of Keisy's adjournment requests were in bad faith. He instead sought additional time to obtain representation, file an application for deferral of removal under the Convention Against Torture, and to adequately prepare for his merits hearing before the IJ, given the challenges he faced in communicating with this counsel during the COVID-19 pandemic. The district court acknowledged that it did not find Keisy's requests for adjournment or his appeal to the BIA "to be frivolous." (SPA 22.) And, in fact, the BIA ultimately sustained Keisy's appeal and remanded the case back to the IJ to address aspects of Keisy's claim that the IJ previously failed to consider. *See* Br. for Appellant at 20.

[27] *See, e.g., Hechavarria v. Sessions*, 891 F.3d 49, 56 n.8 (2d Cir. 2018) (distinguishing between circumstances where an immigrant "has substantially prolonged his stay by abusing the processes provided to him," and where he "simply made use of the statutorily permitted appeals process" (quoting *Nken v. Holder*, 556 U.S. 418, 436 (2009)); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020) (holding that "an alien's good-faith challenge to his removal" should not be held against him, "even if his appeals or applications for relief have

(*continued on the next page*)

The distinction between delay caused by dilatory tactics and delay caused by the good-faith pursuit of lawful immigration relief comports with the overall objectives of the underlying regulatory scheme. While the federal government may have an interest in ensuring that "aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute," *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015), the federal government has no legitimate interest in deterring individuals from pursuing meritorious claims for immigration relief. In fact, courts repeatedly have held that a petitioner's likelihood of obtaining such relief weighs *against* the reasonableness of his continued detention

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drawn out the proceedings"); *Hernandez v. Decker*, No. 18-cv-5026, 2018 WL 3579108, at *7 (S.D.N.Y. July 25, 2018) ("pursuit of relief from removal does not, in itself, undermine a claim that detention is unreasonably prolonged"); *Brissett v. Decker*, 324 F. Supp. 3d 444, 453 (S.D.N.Y. 2018) (same); *see also Reid v. Donelan*, 819 F.3d 486, 500 n.4 (1st Cir. 2016) ("[T]here is a difference between 'dilatory tactics' and the exercise of an alien's rights to appeal."), *op. withdrawn on other grounds*, 2018 WL 4000993 (1st Cir. May 11, 2018); *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("[A]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take."), *abrogated on other grounds*, *Hamama v. Adducci*, 946 F.3d 875, 880 (6th Cir. 2020).

without a bond hearing.[28] Under the district court's reasoning, individuals such as Keisy reap no benefits from asserting good-faith defenses to removal and instead face a Hobson's choice: acquiesce to removal or be subject to prolonged detention while vindicating potentially meritorious claims for relief.

The district court's analysis also ignores the current state of the immigration system, in which removal proceedings often take years to complete even when no party has engaged in bad-faith delay. In light of the current unprecedented backlog of immigration cases (see *supra* at 4-6), individuals detained pursuant to section 1226(c) may be held, as matter of course, for time periods well beyond the "brief" duration the federal government estimated in *Demore*.[29] The consequences are

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[28] *See* Freya Jamison, *When Liberty Is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention*, 5 Colum. Hum. Rts. L. Rev. Online 146, 160 & n.80 (2021) (surveying cases in the First, Second, Third, Sixth, and Eleventh Circuits).

[29] *Demore*'s conclusion that section 1226(c) detentions are brief was based on the federal government's mistaken representation that such detentions last, on average, no more than five months. *See* 538 U.S. at 529-30. As the federal government admitted in 2016, it had substantially underestimated the time to resolve cases on appeal in its submissions in *Demore*. *See* Letter from Acting Solicitor General Ian Heath Gershengorn to Hon. Scott S. Harris (Aug. 26, 2016) (internet).

especially troubling given that individuals who ultimately obtain immigration relief currently wait, on average, five years to vindicate their claims.[30]

*Second*, the district court erroneously concluded that the absence of any unreasonable delay by the government was an adequate reason to deny Keisy an individualized bond hearing. (*See* SPA 15-23, 26.) Although courts uniformly have held that the *presence* of bad-faith delay by the government weighs in favor of finding an individual's prolonged detention unreasonable,[31] the district court erred in drawing any inference from *the absence* of such delay. As the Third Circuit has explained, even when "the Government has handled the removal case in a reasonable way," the resulting period of detention may still become unreasonably prolonged because "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in" a cumulative length of detention that violates due process. *Chavez-Alvarez*, 783 F.3d at 475 (quotation marks and alterations omitted). Indeed, multiple courts, including other district courts in

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[30] *See* TRAC–Immigration, *Immigration Court Processing*.

[31] *See* Jamison, *supra*, at 158, 160 & n.80.

this circuit, have recognized that the overall length of detention is most probative of whether an individual's detention has become unreasonably prolonged.[32] The district court's focus on the lack of government delay, instead, wholly ignores the reality of delayed processing times for removal proceedings, even when no party is at fault.

*Third*, the district court wrongly concluded that a bond hearing was unnecessary based on its erroneous assumption that Keisy's detention would soon end. (*See* SPA 24.) The court reasoned that, because Keisy's BIA appeal of his order of removal had already been pending for five months and the applicable regulation generally requires the BIA to resolve cases within six months, Keisy's detention was "unlikely to continue much longer" unless he "loses before the BIA and he opts to petition for review before the Second Circuit." (SPA 24 (citing 8 C.F.R. § 1003.1(e)(8)(i)).) The district court's assumption widely missed the mark: the BIA ruled in Keisy's favor, remanding the case for further proceedings that have prolonged Keisy's detention even further (*see* Br. for Appellant at 20)—

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[32] *See, e.g.*, *German Santos*, 965 F.3d at 210 (length of detention is the most important factor for assessing the reasonableness of continued detention without a bond hearing); *Hemans v. Searls*, No. 18-cv-1154, 2019 WL 955353, at *6 (W.D.N.Y. Feb. 27, 2019) (same); *Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266, at *10 (S.D.N.Y. May 23, 2018) (same).

an obvious outcome the district court wholly failed to consider. Thus, far from being over, Keisy's detention grows more prolonged even though the BIA sustained his appeal, and he may ultimately be entitled to remain in the United States.

To be sure, courts cannot always accurately predict when a petitioner's removal proceedings will be completed. But the district court's conclusion that Keisy's continued detention without a bond hearing comported with due process because his detention was "unlikely to continue much longer" (SPA 24), was particularly wrong. Rather than recognize that Keisy's (ultimately meritorious) BIA appeal could prolong the period of detention, the district court assumed, without any basis, that Keisy would *lose* his BIA appeal and be ordered removed. (*See* SPA 24.)

Left uncorrected, the district court's decision will have a devastating impact on not only Keisy himself—who has now been detained under conditions akin to "penal incarceration" (SPA 15), for nearly nineteen months—but the ruling will also set a bad precedent for denying a bond hearing whenever the length of detention is attributable to the detainee's attempt to pursue good-faith immigration relief.

That section 1226(c) makes detention during removal proceedings mandatory does not render Keisy's prolonged detention without a bond hearing per se reasonable. *Demore* did not hold that immigrants detained pursuant to section 1226(c) may be detained for months or years without due process protections. To the contrary, *Demore*'s holding that section 1226(c) is facially constitutional was based on the Supreme Court's determination that such detention was limited to the "*brief* period necessary for the[] removal proceedings" to reach completion. 538 U.S. at 513 (emphasis added). As the Court carefully explained, that period was in fact "brief" because, at the time *Demore* was decided, the federal government estimated that the overwhelming majority of "removal proceedings [were] completed in an average time of 47 days and a median of 30 days," with cases involving appeals taking an average of four months in total. *Id.* at 529.

But these estimates were inaccurate then and certainly do not reflect the prolonged processing times for removal proceedings now. See *supra* at 4-6, 17-18 & n.29. And the assumption that immigration detention would be brief was critical to *Demore*'s outcome: as Justice Kennedy made clear in his concurring opinion (which represented a dispositive vote on the due process question), an immigrant detained under section 1226(c)

"could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified" because "the Due Process Clause prohibits arbitrary deprivations of liberty." *Id.* at 532 (Kennedy, J., concurring). That is precisely what happened here.

Equally unavailing is any suggestion that prolonged detention without a bond hearing is necessary to prevent individuals detained pursuant to section 1226(c) from fleeing or committing further crimes. Amici States have long afforded, in the context of both civil detention and criminal pretrial detention, individualized hearings to assess whether an individual's detention is warranted. Our experiences have shown that such due process protections are not only fundamentally reasonable, but also compatible with the overall goals of our detention schemes. For example, amici States of New York, Massachusetts, and many others require an individualized determination that the pretrial detention of a criminal defendant is necessary.[33]

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[33] N.Y. Crim. Proc. L. § 510.10(1) (McKinney); Mass. Gen. Laws Ann. ch. 276, §§ 57, 58 (West); *see also* Nat'l Conf. of State Legislatures, *Pretrial Release Eligibility and Detention* (2020) (internet).

The States' practices are equally clear and consistent in the context of civil detention. Nearly every State and the District of Columbia provide statutory standards by which the government may obtain an order authorizing emergency hospitalization or involuntary confinement upon a judicial finding that an individual poses a risk of harm to himself or to others.[34] And at least twenty States, as well as the District of Columbia, have likewise enacted statutes requiring an individualized showing by the government that a sex offender suffers from a mental abnormality or disorder that predisposes the offender to commit future acts of sexual violence as a prerequisite for the civil confinement.[35]

While individual States may vary in the procedural protections that their schemes offer to respondents in these civil confinement proceedings (such as, for example, court-appointed counsel or trial by jury), they are consistent in requiring a hearing before a neutral arbiter to determine whether civil detention is appropriate on a case-by-case basis. Amici States' experience with these schemes has demonstrated that, even with respect

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[34] Treatment Advoc. Ctr., State Standards for Civil Commitment (2020) (internet).

[35] Ass'n for the Treatment of Sexual Abusers, Civil Commitment of Sexual Offenders: Introduction and Overview (2015) (internet).

to individuals who are deemed to be more dangerous or high-risk, requiring an individualized determination that civil detention is necessary reflects the proper balance between the individual interest in liberty and the legitimate state interests motivating the lawful civil confinement schemes.

* * *

Amici States urge this Court to make clear that the noncitizen members of our communities are entitled to fundamental due process protections. While the Due Process Clause may permit some reasonable variation in the procedural aspects of civil detention proceedings, there can be no question that, at a minimum, the Constitution requires the government to afford individuals detained pursuant to section 1226(c) an individualized bond hearing to assess dangerousness and risk of flight where, as here, their detentions become unreasonably prolonged.

## CONCLUSION

This Court should reverse the district court's decision.

Dated: New York, New York
May 2, 2022

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Alenette B. Jordan, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,800 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ *Alenette B. Jordan*